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No. 92-840

In The

Supreme Court of the United States

October Term, 1992

PACIFIC SOUTHWEST BANK, F.S.B.,

Petitioner,

vs.

KELLY P. BRADLEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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28 pp

QUESTIONS PRESENTED

Whether the doctrine announced in *D'Oenche Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and its statutory codification in 12 U.S.C. § 1823(e), vitiates the long-standing real defense of homestead established under the Texas Constitution and Texas law.[1]

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1. Upon information and belief, since the filing by the Petitioner of its Petition for Writ for Certiorari, the subject note and lien have been transferred to Commonwealth Land Title Insurance Company ("Commonwealth"), Petitioner's title insurance underwriter, as part of a settlement between Commonwealth and Petitioner. Thus, Petitioner may no longer be the owner and holder of the subject note and lien. Respondent disagrees that the *D'Oenche Duhme* doctrine so heavily relied upon by Petitioner is at all applicable to this case. However, if Commonwealth is now the true owner and holder of the note and lien, since Commonwealth is not an insured depository institution within the federal banking statutes, if the Court finds merit in any of Petitioner's arguments, Commonwealth should be directed to file a brief demonstrating why it should be entitled to the benefits of *D'Oenche Duhme* and its codification. For purposes of this Brief, however, Respondent will address the questions presented in this brief as if no assignment to Commonwealth had occurred.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Statement of Facts

In 1977, Kelly P. Bradley ("Bradley" or "Respondent") and her husband bought a farm consisting of 129.47 acres in Westlake, Texas which they named "Paigebrooke Farm." Title was taken in the Bradleys' name only although several acquaintances helped the Bradleys finance the acquisition. Bradley and her family immediately moved onto the farm and began using it as their home and as a ranch. Deciding that they permanently wanted the entire Paigebrooke Farm as their home, they paid off all of the

individuals who helped finance the acquisition by late 1982 or early 1983. The Bradleys have exclusively owned all of Paigebrooke Farm since that time. (R. Vol. 5, at 27-28, 60-61, 123 and Vol. 6, T. at 53).[2] As the Fifth Circuit held below, "Bradley has satisfied her burden to establish the homestead character of her farm as a matter of law." *Bradley v. Pacific Southwest Bank, FSB*, 960 F.2d 502, 508 (5th Cir. 1992). Petitioner has not questioned this holding. Therefore, Respondent will not reiterate all of the homestead facts supporting the Fifth Circuit's determination.

On August 30, 1985, Bradley and her husband executed a third lien deed of trust which purported to create a lien upon 114.47 acres of the 129.47 acre Paigebrooke Farm for the benefit of Seguin Savings Association ("Seguin"), predecessor-in-interest to Petitioner. The deed of trust was given as additional collateral to secure the payment of a note dated August 30, 1985, in the principal amount of $5,350,000.0, from Bradley and her husband to Seguin. As primary collateral for the loan, Bradley and her husband granted Seguin a deed of trust on approximately 200 acres of separate land in Denton County, Texas, which was held for commercial development. The Seguin loan was specifically made for the purpose of developing this separate 200-acre tract (R. Vol. , T. at 60-61, 64-65).

Seguin was aware at the time it made the loan to the Bradleys that Bradley and her family used Paigebrooke Farm as their home and ranch.[3] Seguin further recognized that Paigebrooke Farm

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2. Citations to the original papers or pleadings filed in the bankruptcy and district courts will be referred to as "R." followed by the page number to which reference is made. Transcripts within a record volume will be referred to as "T." followed by the page number to which reference is made.

3. Respondent is not arguing in this brief that constructive knowledge should be imputed to the FSLIC and its assignee, Petitioner. Respondent is simply pointing out the facts from the record.

might legally constitute Bradley's homestead, but it decided to assume the risk that the lien could be void. Seguin tried to minimize this risk by requiring the Bradleys to sign a homestead disclaimer and designation stating that only 15 acres of Paigebrooke Farm constituted their homestead and that the 114.47 acres of the farm to be pledged to Seguin were not part of the Bradleys' homestead. (R. Vol. 5, T. at 66-67 and R. Vol. 6, T. at 13-14, 16, 18, 21, 25-26, 34-35.)

The Bradleys executed the homestead disclaimer and designation requested by Seguin. They did so based upon Bradley's husband's mistaken belief that under Texas law, because Paigebrooke Farm was located within the incorporated town of Westlake, it would necessarily be categorized as urban land and, therefore, the Bradleys would only be entitled to one acre of Paigebrooke Farm as their homestead. (R. Vol. 5, T. at 67-68, 70-71.)

B. Course of Proceedings and Disposition Below

Bradley originally filed an adversary complaint against Seguin requesting, *inter alia*, that the bankruptcy court avoid Seguin's alleged lien against the Paigebrooke Farm. On November 9, 1988, a trial on the merits was held before the bankruptcy court. At trial, Seguin primarily attempted to prove that the property in issue was urban rather than rural. By Orders entered December 12, 1988, the bankruptcy court, *inter alia*, found that the Paigebrooke Farm was rural in character, and held that Bradley had never alienated or abandoned her homestead rights to the subject property but was only entitled to claim fifteen (15) acres of Paigebrooke Farm as her rural homestead. (R. 269, 271-76, 278-79.)

Bradley moved the bankruptcy court to alter or amend its judgment to declare that the entire farm was homestead property

(R. 281-88), and Seguin moved the bankruptcy court to amend the judgment to hold that the farm was urban property. (R. 289-93.) On December 27, 1988 based upon its Supplemental Findings of Fact and Conclusions of Law, as well as the previously entered Findings of Fact and Conclusions of Law, the bankruptcy court further stated that it was appropriate for the bankruptcy court to find *in favor of Bradley* and against Seguin. (R. 297, 298.) This comment is inexplicable given that the result of the ruling was to allow Seguin's secured claim to encumber all the property against which it claimed a lien.

On or about December 29, 1988, the Federal Home Loan Bank Board appointed the Federal Savings & Loan Insurance Corporation ("FSLIC") as receiver for Seguin and transferred the assets of Seguin to Pacific Southwest Bank, FSB, Petitioner herein ("Pacific" or "Petitioner"). (R. 657.)

On May 22, 1989, Pacific filed its Motion to Intervene and for Substitution. On June 2, 1989, the bankruptcy court entered an Agreed Order granting Pacific Southwest's Motion to Intervene and for Substitution. (R. 723-24.) On June 9, 1989, the bankruptcy court without comment entered an Order denying Bradley's Motion for New Trial. (R. 763-64.) Bradley thereafter perfected her appeal to the district court. (R. 765-792, 969.)

On November 26, 1990, the district court entered a Memorandum Opinion and Order affirming the bankruptcy court's ruling. (R. 969-85.) Bradley thereafter perfected her appeal from the Memorandum Opinion and Order entered by the district court. The Fifth Circuit Court of Appeals reversed and remanded in favor of Bradley. *Bradley v. Pacific Southwest Bank, FSB*, 960 F.2d 502 (5th Cir. 1992), *reh'g denied*, 966 F.2d 1450.

SUMMARY OF ARGUMENT

A. The *D'Oenche Duhme* Doctrine Does Not Apply.

The banking industry will not shake to its foundation, or even shudder, by the Fifth Circuit's acknowledgment of century-old Texas law that a constitutionally created right of homestead is a real defense to the attempt by a lender to enforce a void deed of trust lien. Texas homestead laws are created by the Texas Constitution. Once property has been dedicated and established as homestead, the homestead protection can only be lost by death, abandonment or alienation. The Texas homestead laws provide that a lien on homestead is valid only for purchase money financing, taxes or for home improvement loans to the extent of the value of the improvements. Equity loans and any loans for non-purchase money or non-improvement loans are void from their inception. When accepting a homestead disclaimer, a duty of inquiry is placed on lenders in the State of Texas to verify that the property is in fact being used in a non-homestead manner. If a lender fails to perform its due diligence and does not independently verify that the property is not being used for homestead, such lender will not be allowed to abrogate the Texas Constitution by relying on a homestead disclaimer.

Contrary to the Petitioner's argument, Bradley is not asserting a secret agreement made unenforceable by *D'Oenche Duhme* and its codification and progeny. Bradley is asserting a real defense to enforcement of a void lien provided by the Texas homestead laws. The Texas homestead defense to the enforceability of a lien is a real defense, just as fraud in the factum is a real defense. Thus, the *D'Oenche Duhme* doctrine is inapplicable, as it does not defeat real defenses.

The cases cited by the Petitioner for the proposition that the *D'Oenche Duhme* doctrine defeats the Texas homestead defense are inapposite, as they all involve one of the three exceptions to the

homestead defense, or they involve personal defenses as opposed to real defenses.

B. Reasons For Not Granting the Petition For Writ.

1. The Petition Does Not Raise Any Issue Of Exceptional Federal Importance.

The petition does not raise any issue of exceptional federal importance. The Petitioner argues that the FDIC will not be able to rely on records of depository institutions if the FDIC cannot rely on homestead disclaimers. However, examiners must be aware of local state laws regarding the perfection and validity of liens. An impermissible lien on homestead property is just as void as a deed of trust which is forged. Certainly, Petitioner would not argue that a state law which invalidates a forged deed is in violation of *D'Oenche Duhme*. The Texas homestead laws are similar local law requirements.

Texas has created a duty of inquiry on the part of lenders to ensure that homestead disclaimers conform with reality. Where the depository institution fails to ensure that the disclaimer meets with reality, the disclaimer is meaningless.

Contrary to the argument of Petitioner, the Fifth Circuit's decision below was not based upon constructive knowledge being imputed to the FDIC. Under Texas law, a purported lien on homestead which does not conform to law is void from its inception. Thus, knowledge or constructive knowledge is irrelevant. Actual usage as homestead is the paramount concern.

2. The Fifth Circuit's Decision Does Not Create A Conflict With The Decisions Of The Supreme Court, Other Circuit Courts, And Within The Fifth Circuit Itself.

There is no conflict between the decision rendered by the Fifth

Circuit Court of Appeals below and the decisions of this Court, other circuit courts, and within the Fifth Circuit itself. All of the cases cited by Petitioner are either cases wherein (i) the facts fit within the three well-known exceptions to the Texas homestead doctrine, or (ii) personal defenses (as opposed to real defenses) are being defeated by *D'Oenche Duhme.*

3. The Basis Of The Fifth Circuit's Decision Was Not The Constructive Knowledge Of The Failed Institution But The Homestead Rights Created By The Texas Constitution And The Longstanding Texas Public Policy Of Not Allowing Form Adhesion Contracts To Abrogate The Texas Constitution.

The imputation of constructive knowledge was not the basis of the Fifth Circuit's decision rendered below. The basis of the Fifth Circuit's decision below was that the Texas homestead doctrine creates a real defense and gives lenders a duty of inquiry to determine that homestead disclaimers conform with reality.

ARGUMENT

I.

THE *D'OENCHE DUHME* DOCTRINE DOES NOT APPLY.

The Texas homestead protection is created by the Texas Constitution and property is either homestead or not in the first instance. Once the property has been dedicated and established as a homestead, the only way for it to lose its homestead character is by death, abandonment or alienation. *Gerrard v. Henderson*, 209 S.W. 2d 225, 229 (Tex. Civ. App. 1949, no writ). To meet the initial burden of homestead character, mere evidence of overt acts of homestead usage is sufficient evidence from which Texas courts will presume that the homestead claimant possesses the requisite

intent. *See Youngblood v. Youngblood,* 124 Tex. 184, 76 S.W. 2d 759, 761 (1934). *See also First Interstate Bank v. Bland,* 810 S.W. 2d 277, 286 (Tex. App. - Fort Worth 1991, no writ); *Lifemark Corp.,* 655 S.W. 2d at 315. Once a homestead claimant has established the homestead character of his or her property, the burden shifts to the creditor to disprove the continued existence of the homestead. *See Sullivan v. Barnett,* 471 S.W. 2d 39, 43 (Tex. 1971); *Lifemark Corp. v. Merritt,* 655 S.W. 2d 310, 314 (Tex. App. - Houston [14th Dist.] 1983, writ ref'd n.r.e.). Petitioner has not questioned the nature of Paigebrooke Farm as homestead.

Under the Texas Constitution, a burden is placed on the lender to investigate at the inception of the loan as to whether or not a borrower is using property as his or her homestead. *In re Niland,* 825 F.2d at 809. To permit a lender to simply rely on a sworn declaration would

> result in the routine execution of such affidavits by persons owning homesteads in order to obtain loans secured by homestead property for impermissible purposes, thereby rendering the constitutional homestead protection nugatory. . . This rule is also based on a recognition that many in financial difficulties will sign anything to obtain money from lenders, and that *if not put to a duty of inquiry, many lenders will simply have the borrower execute a form affidavit* stating that the property is not claimed as homestead. It is interesting to note that this is exactly what happened in this case.

Id. (emphasis added).

The Texas Supreme Court has outlined three categories in

which a homestead complaint can be estopped from claiming his or her homestead:

> Our courts have in certain cases enforced against the homestead certain liens which were created neither for purchase money nor for improvements contracted for as provided for in the provision of the Constitution just quoted. Those cases were generally classified as follows: "(1) When the owners, *not actually occupying the property,* or so using it that its status is dubious at the time the mortgage is executed, represent that it is not their homestead; (2) when the owners create a lien by entering into a simulated transaction which has all the outward appearance of a valid, unconditional sale, but which is in fact a mortgage; (3) when the owners represent that existing notes are valid mechanic's lien notes for improvements, secured by a mechanic's lien contract properly executed."

Niland, 825 F.2d at 809, *quoting Lincoln v. Bennett,* 138 Tex. 56, 59, 156 S.W. 2d 504, 505 (1941) (emphasis supplied by *Niland* court).

The only cases in which courts have allowed a Texas homestead claimant to be estopped using the *D'Oenche Duhme* doctrine or 12 U.S.C. § 1823(e) are cases fitting into one of the three categories mentioned above. One of the primary cases cited by Petitioner falls into such an exception. In *Templin v. Weisgram,* 867 F.2d 240 (5th Cir. 1989), the borrower engaged in a simulated sales scheme to enable a lien to be placed on his alleged homestead through a sham transaction.. The court noted as follows:

> In *In re Howard*, 65 B.R. 498 (Bankr. W.D. Tex. 1986), the court held that the debtor's assertion that Tex. Const.. art. 16 § 50 invalidated the F.D.I.C.'s lien on his homestead was not barred by § 1823(e). Without expressing approval of the result reached or the reasoning used by that court, we note that *Howard* is distinguishable for the simple reason that, in that case, "no agreement [was] sought to be enforced by the *Howards* against the FDIC. *Id.* at 503. In *Howard*, no simulated sale took place; the debtor simply asserted that the deeds of trust which he personally executed and the bank accepted were invalid on their face. Unlike the parties in this case, therefore, neither party in *Howard* sought to enforce or introduce evidence relating to an undisclosed side agreement in contravention of § 1823(e).

Templin, 867 F.2d at 242, n. 3.

The *Templin* court distinguished the simulated sale situation from the homestead defense which was discussed in *Howard*. The borrowers in *Howard* executed a document whereby they represented and warranted that the lien on the property was valid. 65 B.R. at 500. As in the instant case, the court in *Howard* held that there was no secret oral agreement which the borrower was attempting to enforce. 65 B.R. at 503. The court held that the borrowers were not relying on any agreement but were rather asserting a claim based upon a well established body of homestead law in the State of Texas which provides that the lien sought to be enforced is void to the extent that it provides for a lien on homestead to secure obligations which are not for purchase money financing, taxes nor improvements. *Id.* The court held that Texas law would not recognize even an express, voluntary waiver or

disclaimer of the constitutional right to claim a homestead. *Id.* at 503, *citing White v. Luton* (*In re White*), 47 B.R. 98, 101 (Bankr. S.D. Tex. 1985); *Texas Land and Loan Company v. Blalock*, 76 Tex. 85, 13 S.W. 12, 13 (1890). The *Howard* court held that Texas homestead laws "exist independent of any agreement between the parties and, indeed, in spite of any agreement." *Id.*

The *Howard* court held that Texas homestead laws rendered the original transaction in which the lender sought to impose alien void and not just voidable. *Id.* at 507-508. Thus, the borrowers' homestead defense was a real defense to the enforcement of the lien as distinct from the personal defenses which are barred by 12 U.S.C. § 1823(e), the *D'Oenche Duhme* doctrine, and the federal holder in due course doctrine. *Id.* at 508. The absolute invalidity under Texas law of the non-purchase money lien on the borrowers' homestead distinguishes the homestead case from those involving the assertion of merely personal defenses and, in the absence of congressional intent to exempt the FDIC from homestead laws, the *Howard* court held that the FDIC is subject to the laws of Texas governing the validity of liens on a homestead. Therefore, the FDIC's lien on the borrowers' homestead was declared void to the extent it did not secure purchase money financing, an improvement loan, or a tax claim. *Id.* at 509.

The Fifth Circuit Court of Appeals in *Patterson v. Federal Deposit Insurance Corporation*, 918 F.2d 540 (5th Cir. 1990) held that neither 12 U.S.C. § 1823(e) nor the federal holder in due course doctrine precluded a borrower from attempting to prove her right under Texas law to her homestead. *Id.* at 543-544. In *Patterson*, the court distinguished the facts in *Templin* which fell within one of the few recognized means in Texas for precluding a homestead defense (*i.e.*, the simulated sale scenario). *Id.* at 545. The court held that the homestead disclaimer contained in the deeds of trust did not result in the debtor being estopped from claiming homestead. *Id.* at 546-47.

In a case directly on point with the facts in *Bradley*, the court in *In re Napier*, 144 B.R. 719 (Bankr. W.D. Tex. 1992) held that the *D'Oenche Duhme* doctrine and its codification did not estop the debtors from asserting their Texas homestead exemption even though the debtors had executed non-homestead affidavits and designations. *Id.* at 725.

In the instant case, Bradley established the homestead character of the entire 129.47 acres as a matter of law and met her initial burden of proof by showing evidence of overt acts of homestead usage and other evidence of intention. Petitioner has never asserted that the homestead nature of the property was abandoned or alienated by Bradley. Petitioner relies solely upon the homestead disclaimer and affidavit which courts in Texas have uniformly held to be invalid for over one hundred years. *See In re Niland*, 825 F.2d 801, 808-810 (5th Cir. 1987).

The only cases cited by Petitioner where the *D'Oenche Duhme* doctrine or 12 U.S.C. § 1823(e) was used to defeat a homestead claim are *Templin* (a simulated sale case) and *Buchanan v. Federal Savings & Loan Insurance Corporation*, 935 F.2d 83 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 639 (1991) (a mechanic's lien note case). Both of these cases fit within the well recognized exceptions to the homestead doctrine and are therefore not homestead cases such as exist in the *Howard, Niland, Napier, Patterson*, and the instant case.

In *Buchanan*, the debtor signed a contract creating a lien on her house which contract contained a recital that the work had not yet begun nor had materials yet been supplied prior to the signing of the document. *Buchanan*, 935 F.2d at 8. The providing of materials or commencement of work prior to the signing of such document would render the document invalid under Texas law. *Id.* However, the *Buchanan* facts fit squarely within one of the well recognized state law exceptions to the homestead doctrine. *Niland*,

825 F.2d at 809. Unlike the factual misrepresentation by the borrower in *Buchanan*, in the instant case, Kelly Bradley signed the homestead disclaimer based upon an erroneous legal conclusion conveyed to her that the property she owned was within the city limits of Westlake and that she was, therefore, entitled to only one acre by law. However, location within the city limits is not dispositive of the urban versus rural homestead character of a property if no city services are provided. Tex. Prop. Code § 41.002(c). No city services such as the providing of water and sewer services were provided by the City of Westlake (R. 268-269) and, therefore, the issue of the location within the city limits of Westlake was not dispositive.

In this case, Bradley does not seek to enforce any agreement with Seguin. The Texas homestead laws exist independent of any agreement between the parties and, indeed, in spite of any agreement. *Howard*, 65 B.R. at 503. Bradley established the rural homestead character of the entire 129.47 acres as a matter of law and, therefore, the burden shifted to the Petitioner to show abandonment. The Petitioner did not even attempt to argue abandonment and simply argued estoppel based upon a homestead affidavit and disclaimer. However, the homestead affidavit and disclaimer did not fall within one of the three well recognized exceptions to the Texas homestead laws and, therefore, homestead is a "real" defense not precluded by *D'Oenche Duhme*, 12 U.S.C. § 1823(e), or the federal holder in due course doctrine. Thus, under Texas law, the lien of Seguin was void from its inception. No title to a void lien could be passed to the FSLIC and Pacific does not have a valid lien on the property. *See Langley v. Federal Deposit Insurance Corporation*, 484 U.S. 86, 93-94 (1987); *Howard*, 65 B.R. at 507-508.

II.

REASONS FOR NOT GRANTING THE PETITION FOR WRIT.

A. The Petition Does Not Raise Any Issue Of Exceptional Federal Importance.

As outlined above, neither the *D'Oenche Duhme* doctrine, 12 U.S.C. § 1823(e), nor the federal holder in due course doctrine precludes the homestead defense created by the Texas Constitution. The Petitioner argues that this is a case of national importance affecting the integrity and stability of the national banking system. The Petitioner cites to the decision in *Langley v. Federal Deposit Insurance Corporation,* 484 U.S. 86 (1987) for the premise that the *D'Oenche Duhme* doctrine permits federal and state banking examiners to rely upon a depository institution's records in evaluating its worth and in determining whether to liquidate or to provide financing for any acquisition and purchase. *See* Pacific's Petition for Writ of Certiorari (the "Petition"), Page 12. In fact, the decision in *Langley* supports the Respondent's position.

This Court in *Langley* stated that "Respondent conceded at oral argument that the real defense of fraud in the factum . . . would take the instrument out of Section 1823(e), because it would render the instrument entirely void, . . . thus leaving no 'right, title or interest' that could be 'diminish[ed] or defeat[ed]'." *Id.* at 93-94. This Court recognized that there are certain defenses to the *D'Oenche Duhme* doctrine and § 1823(e), carefully distinguishing between voidable title and void title. Because the defense alleged in *Langley* involved alleged agreements and misrepresentations on the part of the bank (*i.e.,* personal defenses), these defenses merely rendered the promissory note voidable rather than void. *Id.* at 94. As demonstrated above, the homestead defense of Bradley resulted in a void lien. Since the lien was void, there was no title or interest

to be transferred to the FSLIC nor, in turn, to Pacific.

The Fifth Circuit's decision in *Bradley* is not based upon the constructive knowledge of Seguin being charged to Pacific as argued by Petitioner. Constructive knowledge is irrelevant. Instead, the decision was based on the fact that the lien was void from its inception. As in *Howard,* Bradley does not seek to enforce any agreement, but simply seeks to enforce the substantive laws of the State of Texas rendering the subject lien void.

"*D'Oenche Duhme* has not been read to mean that there could be no defenses at all to the attempts by the FDIC to collect on promissory notes." *Federal Deposit Insurance Corporation v. McClanahan,* 795 F.2d 512, 515 (5th Cir. 1986). Forgery would be such a real defense which would not be precluded by the *D'Oenche Duhme* doctrine. *Id.* The Sixth Court of Appeals has also recognized that while personal defenses to a note would not be effective against the FDIC, "a holder in due course remains susceptible to all 'real' defenses. Real defenses include infancy, incapacity, duress, some material alterations, and real fraud." *Federal Deposit Insurance Corporation v. Turner,* 869 F.2d 270, 273 (6th Cir. 1989).

Using the Petitioner's logic, any defense at all to the enforcement of a note or a lien which does not appear in a bank's records would be defeated including, without limitation, the real defenses of infancy, incapacity, duress, and fraud in the factum. Thus, if the Supreme Court holds that the *D'Oenche Duhme* doctrine precludes the assertion by Texas borrowers of the homestead defense, all real defenses to the enforcement of notes and liens may thereafter be precluded by the *D'Oenche Duhme* doctrine. By leaving the decision of the Fifth Circuit intact, the court will continue the law as announced in *Langley* and upheld by the Fifth Circuit and the other circuits that real defenses as opposed to personal defenses are effective against all lenders including,

without limitation, the FDIC, the FSLIC, the RTC and their assignees.

B. The Fifth Circuit's Decision Does Not Create A Conflict With The Decisions Of The Supreme Court, Other Circuit Courts, And Within The Fifth Circuit Itself.

The Petitioner asserts that there is a conflict between the Fifth Circuit decision in *Bradley* and the decisions of the Supreme Court, other circuits, and within the Fifth Circuit itself. Petition, Pages 14-22. An analysis of the decisions cited to by Petitioner reveals that all of the decisions cited therein involve personal defenses and none involve real defenses.

Petitioner cites to the decision in *Langley* and refers to agreements and conditions precedent to the performance of a "counter promise" or "the truthfulness of a warranted fact." Petition, Page 16. The decision in *Langley* is discussed above and is distinguishable for the reasons discussed. The decision in *Langley* involved alleged fraud in the inducement and alleged misrepresentations on the part of the borrower. Both of these allegations involved personal defenses, not real ones.

In *Abrams v. FDIC,* 944 F.2d 307, 310 (6th Cir. 1991), an alleged oral promise by the bank's president not to collect any deficiency remaining after a default by the borrower was held by the court to be barred. Obviously, this was a personal defense which was precluded by the *D'Oenche Duhme* doctrine and § 1823(e).

In *Porras v. Petroplex Savings Association,* 903 F.2d 379, 380-81 (5th Cir. 1990), cited by Petitioner, the personal defense of usury was asserted. It is, therefore, distinguishable from the instant case.

The decision in *Templin* is discussed above and involved a

simulated sale/sham transaction which fits within one of the three exclusive exceptions to the homestead exemption laws of the State of Texas. In addition, the court in *Templin* carefully distinguished a constitutional homestead case from the simulated sale scenario existing in *Templin*. 867 F.2d at 242, n. 3.

The decision in *FDIC v. Galloway*, 856 F.2d 112, 114-15 (10th Cir. 1988) involved a purported false statement by a bank president to guarantors that the maker of the note had paid the note off. The defense asserted by the defendant in *Galloway* was based upon an alleged representation by the bank president that the guarantor would only be liable for the obligation on the note issued at the time that the guarantor signed his guaranty. This alleged defense was in the nature of an oral promise or fraud in the inducement, and, as such, it was a personal defense precluded by § 1823(e). *Id.* at 114-115.

In *FDIC v. Cardinal Oil Well Servicing Co.*, 837 F.2d 1369, 1372 (5th Cir. 1988), the guarantors' defense arose out of a bank officer's alleged fraudulent statement to the guarantors that the guaranties would not be enforced according to their express terms but would only cover the corporation's present indebtedness. Obviously, this defense was a personal defense in the nature of an oral promise or fraud in the inducement.

In *FDIC v. Investors Associates X., Ltd.*, 775 F.2d 152, 156 (6th Cir. 1985), the maker signed two blank notes based upon the bank's president's unrecorded, oral assurances that the maker would not be personally liable and would never have to pay on the promissory notes. *Id.* at 155. This case is distinguishable from the instant case since the facts in *Investors* fit squarely within the *D'Oenche Duhme* doctrine whereby a borrower gives a note to a bank with a secret agreement that it will not be enforced. *D'Oenche Duhme*, 315 U.S. at 460. Kelly Bradley is not seeking to enforce any agreement at all but is asserting that the lien was void from its inception. *Howard*, 65 B.R. at 503.

In all of the factual scenarios cited by the Petitioner, the defenses were personal defenses which merely involved voidable title to the asset in question. None of the cases involved real defenses such as the homestead right created under Texas state law or forgery, infancy, incapacity, duress, or fraud in the factum. Thus, contrary to Petitioner's assertion, there is no direct and apparent conflict by the Fifth Circuit decision in *Bradley* with the decisions of the Supreme Court, other circuit courts, and within the Fifth Circuit itself.

C. The Basis Of The Fifth Circuit's Decision Was Not The Constructive Knowledge Of The Failed Institution But The Homestead Rights Created By The Texas Constitution And The Longstanding Texas Public Policy Of Not Allowing Form Adhesion Contracts To Abrogate The Texas Constitution.

The Petitioner asserts that the Fifth Circuit's decision in Bradley is based upon the charging of constructive knowledge of the failed depository institution to the successor depository institution. As set forth above, this was not the basis of the Fifth Circuit's decision. Bradley is not attempting to enforce any agreement against or impute any constructive knowledge to the FSLIC or Pacific, but rather it is Pacific which is seeking to enforce its deed of trust and the disclaimer. *Howard*, 65 B.R. at 503. Bradley is not relying on any agreement but is asserting a claim based upon a well established body of law of the State of Texas which provides that the agreement which Pacific seeks to enforce is void. *Id.* Knowledge or constructive knowledge is irrelevant.

The cases of *Capital Bank & Trust Co. v. 604 Columbus Avenue Realty Trust (In re 604 Columbus Avenue Realty Trust)*, 968 F.2d 1332 (1st Cir. 1992); *Adams v. Madison Realty & Development, Inc.*, 937 F.2d 845 (3rd Cir. 1991), and *Twin Construction, Inc. v. Boca Raton, Inc.*, 925 F.2d 378 (11th Cir. 1991) cited by Petitioner involved, respectively, (i) fraud in the

inducement and an alleged kick-back arrangement between a bank officer and the debtor's representative; (ii) an alleged side agreement wherein the lender purportedly agreed to reserve funds to satisfy an agreement between the owner and the contractor; and (iii) an alleged fraud in the inducement defense. These cases are inapposite as all involved personal defenses.

Similarly, the decisions from the Fifth Circuit cited by Petitioner as being in conflict with the Fifth Circuit's *Bradley* decision are easily distinguishable. The decision by the Fifth Circuit in *FDIC v. Langley*, 792 F.2d 541 (5th Cir. 1986), *aff'd*, 484 U.S. 86 (1987) is distinguishable for reasons cited above including, without limitation, the fact that *Langley* involved an alleged fraudulent misrepresentation and fraud in the inducement on the part of the lender, not fraud in the factum. *Kilpatrick v. Riddel*, 907 F.2d 1523 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 954 (1991), involved alleged fraud in the inducement and certain alleged oral misrepresentations and omissions on the part of the bank officers which were personal defenses.

With respect to the citation by the Petitioner to *Aero Support Sys., Inc. v. FDIC*, 726 F. Supp. 651 (N.D. Tex. 1989), the Petitioner's citation is erroneous because the *dicta* in *Aero Support* is erroneous. In citing to *Templin*, the court in *Aero Support* stated that the Fifth Circuit had recently indicated that the *D'Oenche, Duhme* doctrine may override such protections as the Texas homestead exemption protection. 726 F. Supp. at 653. As discussed *supra*, *Templin* does not stand for such proposition, and, therefore, Petitioner's reliance on *Aero Support* for such proposition is equally misplaced. The *Templin* case involved a simulated sale/ sham transaction which is one of three well recognized exceptions to the homestead exemption. The *Templin* court went to great lengths to distinguish itself from the facts in *Howard* since the *Templin* court recognized that the borrowers in *Howard* were not seeking to enforce an agreement of any kind but were simply

relying on the long established homestead exception law in the State of Texas. *Templin,* 867 F.2d at 242, n. 3. Thus, *Aero Support* provides little support to the Petitioner's position.

CONCLUSION

The Texas homestead laws have a long history of protecting borrowers from not only unscrupulous lenders and charlatans but from themselves. The law in Texas allows liens on homestead only for purchase money financing, tax liens, and improvements to the property. Texas law imposes a duty of inquiry on lenders to investigate whether property is in fact not the homestead of the borrower. If the lender fails to investigate, or investigates and reaches the wrong conclusion, or, as in the present case, suspects that the property probably is homestead but asks for a form adhesion disclaimer to be signed, the lender has a *void* lien. Knowledge or constructive knowledge is irrelevant.

Bradley met her initial burden of proof to show that the property was her homestead. The burden then shifted to Seguin, now Pacific, which never even attempted to prove abandonment of that homestead but relied solely upon an estoppel argument based upon the homestead disclaimer and affidavit. There are only three exceptions to the homestead exemption involving estoppel in the State of Texas, and the facts in the instant case do not fit within any of the three exceptions.

Homestead is a real defense such as forgery, infancy, duress, incapacity, and fraud in the factum. All of the cases cited by Petitioner involved personal defenses such as fraud in the inducement or they fit within well known exceptions, and are therefore not on point.

The decision by the Fifth Circuit does not conflict with any decisions of the Supreme Court, any decisions in any other circuits,

and there is no conflict within the Fifth Circuit Court of Appeals. The decision below of the Fifth Circuit Court of Appeals provides no basis for this Court to grant a Writ of Certiorari.

WHEREFORE, the Respondent respectfully prays that this Court deny the Petition for Writ of Certiorari, and grant to the Petitioner such other and further relief as may be just and proper under the circumstances.

Respectfully submitted,

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